

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Temporary Immediate  
Suspension of the Family Child Care License  
of Cynthia Theis

**RECOMMENDATION FOR AN  
ORDER OF DISMISSAL**

This matter came before Administrative Law Judge James E. LaFave upon a Notice and Order for Hearing dated November 9, 2012 and Licensee's Motion to Dismiss dated December 3, 2012.

Grace Song, Assistant Hennepin County Attorney, appeared on behalf of the Hennepin County Human Services Department (County) and the Minnesota Department of Human Services (Department). John T. Bryant, Attorney at Law, appeared on behalf of Cynthia Theis, the Licensee.

A telephone prehearing hearing conference was held on December 4, 2012, to hear argument on the Licensee's Motion to Dismiss. The record closed on December 5, 2012, upon the filing of the parties post-hearing submissions.

**RECOMMENDATION:**

Based upon the file, record and proceedings herein and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge recommends that:

The Order for the Temporary Immediate Suspension of the Family Child Care License of Cynthia Theis be **RESCINDED**.

Dated: December 19, 2012

s/James E. LaFave

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JAMES E. LAFAVE  
Administrative Law Judge

## MEMORANDUM

### Facts

On November 8, 2012, the Department issued an Order of Temporary Immediate Suspension, suspending Ms. Theis' license to provide family childcare.<sup>1</sup> Her business has been closed since that date. The Order for Temporary Immediate Suspension did not provide the reasons for the immediate suspension nor did it list what rules or regulations Ms. Theis violated.<sup>2</sup> The Order stated: "Due to the serious nature of the matter under investigation, Hennepin County Human Services and Public Health Department cannot ensure the safety of the persons served by your program."<sup>3</sup>

Ms. Theis appealed the Order of Temporary Immediate Suspension on November 9, 2012. In her letter of appeal she stated: "As the order did not disclose the nature of the violations that form the basis of the suspension, I am unable to refute them at this time. I would request, however, that the alleged violations be made known to me as soon as possible."<sup>4</sup>

On November 9, 2012, Ms. Theis was served with a Notice and Order for Hearing. The Notice and Order for Hearing stated: "The issues to be considered are set forth in the attached Exhibit A. Exhibit A to the Notice and Order for Hearing, merely stated: "The Temporary Immediate Suspension Order was issued as a result of ongoing sleep violations."<sup>5</sup> There were no specific facts alleged and there was no citation to any alleged violation of statutes or rules.

This Tribunal issued a Protective Order on November 21, 2012. Served with the Protective Order was the Second Prehearing Order. The Second Prehearing Order required the County and the Department to provide the notice to Ms. Theis of the claimed violations on or before November 29, 2012, such notice is required by Minn. Stat. § 245A.07, subd. 2, Minn. R. 9502.0341 and Minn. R. 1400.8550.

On November 29, 2012, the Department personally served Ms. Theis with its proposed exhibits for the Temporary Immediate Suspension Hearing. The Department admits it did not amend Exhibit A to the Notice and Order for Hearing.<sup>6</sup>

On December 3, 2012, Ms. Theis moved to dismiss the proceeding against her or in the alternative, have the Court issue an Order reinstating her child care license immediately. Ms. Theis asserted that the Department failed to comply with the Second

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<sup>1</sup> See Notice and Order for Hearing Ex. B.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See Department's proposed Ex. 9.

<sup>5</sup> See Notice and Order for Hearing Ex. A.

<sup>6</sup> See Memorandum in Opposition to Motion to Rescind the order of Temporary Immediate Suspension of the Family Child Care License of Cynthia Theis at p. 1.

Prehearing Order and that without fair notice of the claimed violations, she could not prepare for hearing.<sup>7</sup>

On December 4, 2012, a telephone prehearing conference was held to hear argument on Ms. Theis' motion. The Department requested and was granted the opportunity to further brief the issue.

The record for the motion closed on December 5, 2012, upon the filing of post-hearing submissions.

## **ANALYSIS**

### **I. Licensees are Entitled to Notice of Claimed Violations.**

#### **a. The Due Process Clauses of the U.S. Constitution and the Minnesota Constitution Apply to Administrative Law Proceedings**

The Minnesota Supreme Court has made clear that "[t]he observance of the constitutional 'due process' requirement is as important in administrative law as elsewhere."<sup>8</sup> The Court approved of Mr. Chief Justice Hughes' statement "in administrative proceedings of a quasijudicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play."<sup>9</sup>

The Minnesota Court of Appeals has observed that at a minimum, "[t]he requirement of procedural due process includes the requirements of notice and opportunity to be heard."<sup>10</sup> "In order to be constitutionally sufficient, the notice should have communicated the interest at stake."<sup>11</sup>

The Minnesota statutes and rules governing hearings after the Department has issued an order of temporary immediate suspension provide the requisite due process protections.<sup>12</sup> These laws and rules mandate the Department give the licensee the specific reasons the order for temporary immediate suspension was issued, as well as, the specific statutes and rules that the licensee is alleged to have violated.

#### **b. Minnesota Statutes and Rules Guarantee Notice to Licensees**

In any contested case all parties shall be afforded an opportunity for hearing after reasonable notice.<sup>13</sup> Several provisions govern the specific notice a licensee is to

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<sup>7</sup> See December 3, 2012, letter to the Honorable James E. LaFave at p. 1-2.

<sup>8</sup> *Juster Bros., Inc. v. Christgau*, 214, Minn. 108, 7 N.W.2d 501, 507 (Minn. 1943).

<sup>9</sup> *Id.* at 507-508, citing *Morgan v United States*, 304, U.S. 1, 14, 58 S.Ct. 773, 775, 999, 82 L.Ed. 1129, 1130.

<sup>10</sup> *Hough Transit Ltd. v. Harig*, 373 N.W.2d 327, 333, (Minn. Ct. App. 1985).

<sup>11</sup> *Id.*

<sup>12</sup> See Minn. Stat. § 245A.07, subd. 2; Minn. R. 9502.03421; and Minn. R.8550.

<sup>13</sup> Minn. Stat. 14.58.

receive after the Department has issued an order for temporary immediate suspension. Minnesota law requires:

- (1) “A *notice stating the reasons for the immediate suspension* ... must be delivered by personal service ...”<sup>14</sup> (emphasis added);
- (2) that the notice “*must ... contain a statement of, and the reasons for, the proposed action.*”<sup>15</sup> (emphasis added); and
- (3) that the “... agency shall issue the notice of hearing.” The notice “shall contain at a *minimum*” (emphasis added):

“C. *a statement of the allegations* or issues to be determined at the hearing *together with a citation to any relevant statutes and rules.* Each alleged violation of statute or rule shall be noted;”<sup>16</sup> (emphasis added)

Minnesota law also mandates that a Judge “only conduct hearings for which proper notice has been given.”<sup>17</sup>

## **II. The Initial Notice Provided by the Department Was Insufficient**

One purpose of the due process clause and the notice provisions contained in the statutes and rules is to put the licensee on notice of the alleged violations claimed by the Department.

Exhibit A to the Notice and Order for Hearing failed to comply with the notice requirements of Minn. Stat. § 245A.07, subd. 2.

Minn. Stat. § 245A.07, subd. 2, requires the Department give the Licensee the “reasons” for the immediate suspension. The Department argues the statement contained in Exhibit A to the Notice and Order for Hearing fulfilled the notice requirements set forth in that law. That statement said: “The Temporary Immediate Suspension Order was issued as a result of ongoing sleep violations.”<sup>18</sup>

The Department’s vague assertion there were “ongoing sleep violations” does not provide the specific reasons for the Department’s action. The statement does not satisfy the notice provisions of that statute.

The Department goes on to argue that because this case involves a temporary immediate suspension only the notice requirements of Minn. Stat. 245A.07, subd. 2.

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<sup>14</sup> Minn. Stat. § 245A.07, subd. 2.

<sup>15</sup> Minn. R. 9502.03421, subp. 3

<sup>16</sup> Minn. R. 1400.8550 (C).

<sup>17</sup> Min. Stat. § 14.50

<sup>18</sup> See Notice and Order for Hearing Ex. A.

apply. The Department reasons that Minn. Stat. 245A.07, subd 2, “trumps” the other provisions of Minnesota law and rule and therefore there is no requirement to provide the licensee with citations to the laws and rules the licensee is alleged to have violated.

The Department’s argument ignores the plain language of Minn. Stat. 245A.07, subd 2. That statute specifically guarantees the licensee the right to an expedited hearing “under chapter 14 and Minnesota Rules, parts 1400.8505 to 1400.8612.” In advance of such a hearing, Minn. R. 1400.8550 (C) requires “a statement of the allegations or issues to be determined at the hearing together with a citation to any relevant statutes and rules. Each alleged violation of statute or rule shall be noted.”

The law and the rules are clear. A licensee is entitled to a clear statement of the reasons for the temporary immediate suspension and a list of the statutes or rules alleged to have been violated.

### **III. None of the Department’s Other Claims Provide and Exemption From Providing Notice**

#### **a. One Day Notice Is Not Sufficient Notice**

At the close of business on December 4, 2012, the Department served an Amended Notice. The Department argues that constituted proper notice.

The Amended Notice did comply with the statutory notice requirements, however, it was served 10 minutes before the close of business, barely more than one day before the hearing. Minn. Stat. § 245A.07, subd 2a, requires the notice of hearing to be served upon a licensee at least ten days prior to the hearing.

The Amended Notice served on December 4, 2012, did not fulfill the notice requirements of rule and law.

#### **b. A Stack of Exhibits Is Not Sufficient Notice**

The Department also argues that because Ms. Theis was given the Department’s exhibits for the hearing on the Temporary Immediate Suspension, she was well aware of the reasons the Department issued the suspension.

On November 29, 2012, instead of providing the notice ordered by the Administrative Law Judge, the Department served Ms. Theis with their exhibits for the hearing. That does not constitute notice of the claimed violations. A stack of exhibits is not a listing of claimed violations or descriptions of the “interest at stake”, as those terms are used by the state courts.

**c. The Department's Obligation to Safeguard Children at Risk of Imminent Harm Does Not Provide An Exemption From Providing The Licensee With Proper Notice.**

The Department argues that the standard involved in this case includes imminent risk of harm to the children. It maintains that a temporary immediate suspension is issued to protect vulnerable children from imminent risk of harm, to allow time for it to complete an investigation and make a final determination as to what conditions are required to ensure the safety of the children in licensee's care.

The Department points out that a temporary immediate suspension hearing is not a full-blown evidentiary hearing. Implicit in the argument is that the licensee is somehow not entitled to the notice requirements set forth in the law.

The Department cited no legal authority for the proposition that a hearing on an order for temporary immediate suspension requires less notice than is required by Minnesota laws and rules. The same information that led the Department to conclude certain laws were violated permits it to name those violations.

**d. The Minnesota Data Practices Act Does Not Forbid Notice**

Finally, the Department argues that the Minnesota Government Data Practices Act<sup>19</sup> prohibits disclosure of investigative data to Ms. Theis. It cites to Minn. Stat. § 13.46, subd. 3 for the proposition that data in an open investigation is classified as "confidential." The Department holds the position it is forbidden by the Data Practices Act from providing a licensee with the facts that form the basis of the temporary immediate suspension because it is data that was collected as part of an on-going investigation.

The Department, however, misreads the statute.

**Minnesota Statutes § 13.46, subd. 3, Investigative Data.**

Minnesota Statutes § 13.46, subd 3 provides, as follows:

(a) Data on persons, ...licensees, and applicants that is collected, maintained, used or disseminated by the welfare system in an investigation, authorized by statute, and relating to the enforcement of rules or law are confidential data on individuals ... and shall not be disclosed except:

(2) pursuant to statute, or valid court order;

(3) to a party named in a civil or criminal proceeding, administrative or judicial, for preparation of defense; or

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<sup>19</sup> See Minn. Stat. chapter 13.

(4) to provide notices required or permitted by statute.

Each of the exceptions listed above applies in this case. On November 21, 2012, a valid Protective Order was issued which specifically allowed for the release of protected data to Ms. Theis. Ms. Theis was a party to an administrative proceedings and release of the data was authorized for the preparation of her defense. Finally, the Department may release data, which is otherwise considered “confidential”, to provide the notices that are required by statute.

The Minnesota Data Practices act clearly contemplated situations like those presented in this case. The Department was required to provide Ms. Theis with the factual basis for the Order of Temporary Immediate Suspension as required by the Protective Order. The Department was required to provide Ms. Theis with the factual basis for the Order of Temporary Immediate Suspension in order for her to prepare her defense. In addition, the Department was required to provide Ms. Theis with the factual basis for the Order of Temporary Immediate Suspension to fulfill the notice requirements set forth in the law.

## **Conclusion**

The Department’s notice in Exhibit A to the Notice and Order for Hearing was too vague as to the reasons for the immediate suspension and it failed to list the laws or rules that Ms. Theis allegedly violated. The notice provided by the Department, therefore, was legally insufficient.

The Department failed to give Ms. Theis the notice required by Minnesota law and rule. A Judge may only conduct hearings for which proper notice has been given. The appropriate result is to grant the motion and rescind the Order for Temporary Immediate Suspension.

**J. E. L.**